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## THE AMERICAN JUDICATURE SOCIETY; AN INTER- PRETATION.

The American Judicature Society was organized in July, 1913, and was granted a charter by the State of Illinois. It is the only organization in the United States devoted exclusively to research and improvement in the administration of justice. It was formed for the purpose of co-ordinating the efforts of bar associations and individual lawyers throughout the country to assist the profession in expressing itself effectually in anticipated changes in courts and procedure.

We behold now a sovereign people entered upon the work of modernizing and humanizing their courts of law with all the decorum of a mob of insurgent schoolboys. The story of the traveller, lost at night in the hills, and overtaken by a thunderstorm, who dropped on his knees and prayed for more light and less noise, must have occurred to many interested observers.

It is unnecessary to go into detail in reviewing a situation which seems to call most for dispassionate study. It is sufficient that there is an element of the Bar impressed with scientific methods, an element not to be paralysed by fear or stampeded by enthusiasm. There are lawyers occupying a sane middle ground in controversies which are waged. They do not look upon this juncture as one calling for unconditional acceptance of any narrow programme. They believe that the need now more than ever before is for light.

The organized Bar of the several States has reacted to the constantly augmented sense of dissatisfaction by attempting to simplify procedure. Further than this the bar associations, by reason of their nature, can hardly be expected to go, but the most elementary classification of causes for dissatisfaction reveals the fact that procedure is only a part of the machinery of justice. The importance of the personal element is proved by the oft stated fact that the able judge, supported by a bar of high

morale, can make a success of the most awkward procedure, while the contrary is equally true; there have been notable instances of simplification failing when entrusted to unsympathetic and uninformed agencies.

There is no disposition to minify this movement to iron out some of the wrinkles in a procedure nearly everywhere productive of wasted effort. Good things come from it. The old controversy between code and common law procedure has been nearly wiped out. Neither system is in itself a guarantee of efficiency. It is coming to be accepted very generally as the result of an exchange of experiences that the source whence comes procedure is more important than the letter of the rule. The movement to lessen legislative interference in this field and to enlarge the power of the courts to create and regulate procedure is gaining ground alike in code and common law States. The study of procedure is often the route to a larger understanding of all the problems, political as well as legal, which are involved.

Of these larger matters the one which seems most immediate is the organization of courts, extending from the smallest details intended to bring order and economy of effort into play to the large scheme of a unified system of State and local courts. Then there are the confessedly more difficult problems involved in the human agencies of justice. How is that most indispensable branch of public service, the judicial, to be made more attractive? The problem is not how to get rid of undesirable judges, but how to select those who will not become undesirable and how to guarantee to them reasonable security of tenure.

Hardly less important are the lawyers who try causes. As to them we have to consider the education of law students, admission to the Bar, organization and discipline. Next comes the selection and use of juries. The problem thus outlined, and especially with respect to the selection and tenure of judges, is one more of political science than of law.

This in itself implies a broad basis of research and ample faith in the opportunity for helpful influence. Consideration of the nature of this opportunity must make a large part of an interpretation of the purposes of the American Judicature So-

ciety. In fairness to the Society it should be said that what follows is merely the individual estimate of a single member.

There are two principal influences which encourage belief that ideal projects in the field of remedial law, embodying such admittedly difficult matters as judicial tenure and organization, are not hopelessly visionary. The first is the insistent demand for the unification of city courts to afford efficiency in commercial litigation and to deal effectively with social problems, and the second is the progress of the short ballot idea.

The present need of our cities has caused the Society to devote its first efforts to drafting a model judicature act for a metropolitan district. It is commonplace to say that in the large cities of the country the judicial machine has been subjected to the most severe stresses and there that it has betrayed its insufficiency. The large city came into being in this country after the creation of the typical court system.

As shown by Professor Roscoe Pound,<sup>1</sup> our court system was modeled quite as much on the French system as the English. England furnished no analogy for the vast territory which we had to provide for. The system as finally developed to meet our needs was adapted to meet economically the demands of a widely scattered community.

It could not be expected that a system created for an American farming district of a century ago should afford satisfaction in the modern city. As cities have grown there has been almost no effort to unify or systematize the courts. There has been nothing but makeshift work all along the line. More judges have been added and new tribunals have been created. In some cities ten, fifteen, twenty, or even more judges of general jurisdiction are at work individually upon dockets comprising thousands of cases annually.

There is one law not in the statutes which defeats the purpose of the State in adding to an already large bench. It is the law of diminishing returns. The addition of one judge to a

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<sup>1</sup>The Administration of Justice in the Modern City, 26 HARVARD LAW REVIEW, 302. The entire article should be read to appreciate the influence being brought to bear on city courts by social needs.

bench of two increases the effectiveness of the court approximately fifty per cent. But without organization and administrative control, the addition of ten judges to a bench of twenty, does not increase the effectiveness of that bench fifty per cent. Partly by reason of the contentious nature of their work, and partly for lack of a responsible head, they get in each other's way. When additions are made to an unorganized bench of fifteen or more there is practically no gain in effectiveness. The machine cannot be speeded by adding more weight.

With respect to inferior courts the situation is usually much worse. To inefficiency is often added downright anti-social motives. The cause for this is universally understood. The difficulty arises from the fact that the magistrate is so large a part of the political party machine, and sometimes a constitutional officer as well, that it has been a thankless and almost hopeless task to reconstruct him.

But it was inevitable that somewhere a radical experiment should have been made to reform the lower courts. It came seven years ago in the organization of the Chicago Municipal court and fortunately was not confined to inferior jurisdiction alone. This court was created for two purposes; to relieve the courts of general jurisdiction and to wipe out the justice shops. For the former end it was given unlimited jurisdiction in contract causes. So it is not only the municipal police court but also the great commercial court of a city of two millions. The experiment was on a scale large enough to make results significant. Competition with typical unorganized courts doing business under the same roof was afforded. And the test was sufficiently radical to insure either great success or emphatic failure.

For the first time in our history the importance of the administrative side of the judicial function was given full recognition. The court was created mainly by three business men and it naturally reflected their experience in efficiency organization. It was provided with a chief justice who was empowered to create branch courts at his discretion, to assign causes, and to direct the activities of all the judges. Then to prevent this businesslike organization from being hampered by the legislature in the tech-

nical and essentially judicial field of procedure, the court was given authority to create and revise its rules, subject to the comparatively few regulations contained in the original act.

A small body of rules was adopted in due time. The litigant, whether plaintiff or defendant, was required to show affirmatively under oath that he had justiciable matter to submit before he could take the time of the court. There has been practically no difficulty administering this simple procedure. It has stood the test of time and won the approbation of a skeptical Bar.

The administrative side was further developed by the requirement that statistics should be collated and published. Aside from merely showing the cost, these statistics throw a flood of light into society's dark corners, affording accurate data upon which relief measures, legislative and otherwise, may be based.

The flexibility of this great organization, which now numbers thirty-one judges and over three hundred ministerial agents, is one of its greatest virtues. A branch court is created whenever the need for one is felt, and the judge best suited to the particular class of causes is assigned to this branch. A considerable amount of specialization was adopted at the beginning, proving the economy possible under such a plan. Then came gradually the addition of branches to meet social needs. The branch court of domestic relations and the branch court of morals have shown other cities how to humanize the law and enforce it. Strength and refinement are allies in this organization. Though a powerful machine it can touch the sensitive nerves of the community without working ruin.

Imitation of the Chicago court was almost immediate. Cleveland, Milwaukee, Pittsburgh, Buffalo, New York and Philadelphia<sup>2</sup> have benefited more or less by taking portions of the comprehensive plan, but no city has taken all, and none has derived as much benefit as it could.

But the development of the efficiency court has only begun. The enthusiasm and energy of thousands of social workers are

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<sup>2</sup> See *The Municipal Court of Philadelphia*, 62 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 289 (February, 1914).—*Editor*.

enlisted in the movement for spreading its doctrines. The more recent success of the branch court of domestic relations has fired their imaginations. It is evident that such a special court, if it be that only in name, will be instituted in many cities. We have already the example of the juvenile court idea, which, originating in Chicago, spread to all parts of the country and to foreign lands, a more impressive instance of reform in the administration of justice than all the changes wrought by bar associations in a generation.

But this situation involves a real danger. A juvenile court can be grafted onto any city's system of courts. So can a court of domestic relations. And every such addition increases the complexity and waste of judicial power which is now one of the greatest defects.

The social organizations see only the prospect for betterment in a particular field. They overlook the fact that the specialized court with social functions was originated by a chief justice with power to assign to it a judge selected for temperament and experience and to hold him subject to an organization which had developed some measure of self-discipline. Each new branch was carefully nursed through its infancy. The crude machinery of politics was not permitted to pervert its destiny.

There is a limit to the number of separate tribunals that can operate successfully in a single field, and in most cities that limit has been exceeded. Of course it is logically absurd that there should be any division of what is theoretically impossible of division, the judicial authority of the commonwealth. There are many cities in the one hundred thousand class which have civil justices, police magistrates, a probate court, and separate courts of general civil and criminal jurisdiction. The addition of more distinct and unrelated courts is certain to be harmful. We need not more courts but fewer. We suffer frightfully from a complexity of concurrent, competing, conflicting and ungoverned courts. One court can do anything. Many courts can do but little. The first step should be toward unification. The more thorough this is, the broader is the foundation upon which can be reared a structure affording the utmost specialization desired.

Of course genuine unification, the merging of all courts within a given jurisdiction, means unification on a State-wide basis, because the State is the essential unit in the administration of justice. A growing acquaintance among the Bar with the relative efficiency secured under the English Judicature Acts is leading to schemes to unify State courts, and when the will is sufficient there is no reason why we should not go farther than England and get more.

The need for specialization by judges is to be met by creating divisions of the court, carefully avoiding rigidity of structure, and the heads of divisions naturally form a judicial council in which can be vested a considerable portion of the rule-making power. For economical operation on the administrative side, and a unified State court would be a big piece of machinery in this respect, there is need for a chief justice to carry out the will of the judicial council in large matters and to direct personally with respect to small ones.

There is also a need for making the appellate division flexible as to membership so that it can be increased or decreased in obedience to the ebb and flow of appellate litigation and obviate the need for intermediate courts of appeal, which are in a number of States peculiarly wasteful contrivances. Coupled with this is the possibility of dignifying the trial bench by permitting its judges to participate to some extent in appellate work. Such mutuality would go far to unify the two branches in fact as well as in form. The friction between appellate and trial benches is due in part to the fact that many supreme court justices never had experience upon the *nisi prius* bench. In one of the leading States all the supreme court justices save one were elevated directly from private practice. Such justices are more inclined to adhere to barren technicalities of procedure than those who have realized from previous experience on the trial bench how difficult it is not to transgress form.

There is another great need but it can hardly be said to be appreciated yet. It is the need for promotion for judges. We realize that it is well to select judges in the prime of life. If they could be given experience in the simpler fields of the law



until their powers had been tested, and assured of promotion to higher places and larger compensation in proportion to their demonstrated ability, a great incentive to faithful work would be afforded and the probability of long tenure would be enhanced whatever might be the terms of their service.

A great impulse for reorganization must come from the universal need for modernizing the local inferior courts. The problem of finding an expert successor for the lay justice of the peace in country districts has exceeded our ingenuity, though the need is universally expressed. But Ontario and other Canadian provinces have solved this problem under conditions identical with those prevailing in the typical State. In Canada the smallest civil action is heard by a Crown judge who before appointment earned recognition in at least ten years practice at the bar. If there is to be respect for our courts they must deserve it, not only for opinions rendered at the State capitol, but broadly in the courts of first instance where are tried the causes of the people who together make public opinion.

The details of a unified court system on a State basis have all been worked out by our northern neighbor. And now Wisconsin is grappling with this question and other States are approaching it, so it appears profitable to bring together all the facts and ideas that seem of practical value.

The progress of the short ballot movement inspires faith in the possibility of reorganizing State courts but is more significant with respect to the matter of expert selection of judges. All that is taught with reference to the need for security of tenure for faithful public servants, and in criticism of the popular election of experts, applies equally to the judicial position. In fact election is seen to be not an ideal form of selection but rather a means for discipline, for involuntary retirement. The Bar is still too skittish to receive with judicial calm suggestions concerning the recall as a substitute for frequent periodic elections. But all that is said concerning the injustice of the recall in the vicious forms in which it has been expressed applies as well to periodic elections.

The problem is one of eliminating the personal interest of the judge in the outcome of the trials in which he participates. The recall is condemned, and rightly, because it potentially introduces into every cause the safety and welfare of the judge. So does the periodic election and short term. It hurts the judge just as much to be shelved at a regular election as at a recall election. It is hard to conceive of any special element of chagrin in the latter. A judge defeated by an unpopular decision might be a hero. Where there is no recall he is pretty sure to be defeated, sooner or later, by a complication of unpopular decisions, the victims of which would never have dared invoke a recall. In a unified court the freedom and prompt dispatch of appeals would necessarily absolve the individual judge of all responsibility to defeated litigants, and place it upon an organization powerful enough to sustain it with equanimity.

Study of the short ballot is recommended to those who deplore the rapid movement toward popular aggrandizement of power, or whatever one may choose to designate the trend implied by direct nominations, the initiative, referendum and recall. It is said, and usually regretfully, that the people, as an unorganized mass, constantly take from their representatives a little more of delegated power, and the motion is that of a ratchet; there is no slip in the opposite direction.

Nothing is more hazardous than prophecy; nothing more difficult than to keep one's bearings when navigating uncharted channels. But certain few observations may be made with reasonable assurance. In the first place our government was one for the greater part invented rather than derived from experience. The abundance of artfully contrived checks proves its academic source. Then it may be said with assurance that in no other civilized nation has there been less organic change in the past century than in ours. This is due in part to the original adequacy of the scheme and in part to the rigidity of written constitutions.

Those worthy persons, some of them lawyers, who are alarmed by the present trend toward decentralization of authority, overlook the fact that this phenomenon has its counterpart

in the short ballot movement. The necessity for limitation in the number of elective offices becomes apparent after a trial of direct nominations. It is the restoration of order out of chaos, which human nature abhors. When the transformation has taken place and only conspicuous positions are left on the ballot it appears that there has merely been a substitution of one or two large checks for a multitude of lesser ones. Here we have again concentration of authority, but in a more workable form.

After all a little real experience enlightens and perchance assures as no amount of theorizing can do. The great phenomenon of our times is the reform of municipal government, a movement that gives heart to all who look for better enforcement of law, judicial as well as administrative. In a few years three hundred and fifty cities have abolished their former academic structure. They have made their political machinery relatively workable. It is at the same time a notable step in the direction of popular control, and a practical concentration of delegated authority in a few hands. The movement is not necessarily hostile to representative government. It is an inevitable reflex of the world of practical affairs, of industry and commerce, an enforcement of economic law that transcends all constitutions.

It appears that an extension of the idea of concentrated power with a few large and effective checks, to county and State government is not far distant. It seems also possible that the employment of the recall with reasonable checks against gusts of passion may permit of limiting and in cases abolishing the primitive, haphazard, and often ineffective check of short terms and periodic elections.

First in business matters and then in municipal affairs we have learned how to make responsibility a workable force. Is it visionary to hold that the same straightforward reasoning with respect to the need for concentrated power, freedom of action, conspicuous leadership, security of tenure and unified organization shall forever be ignored in the judicial branch?

In its newer applications the short ballot principle may be revolutionary, but it is not strange or radical. It has always been in vogue in our federal structure in an extreme form. Of

all our federal officers we elect only four. Its application to State needs may lead to the axiom that there should be one vote for the head of the executive branch, one for the legislative representative (or two if the bi-cameral system persists) and one for the head of the judicial branch. With the short ballot comes expert selection under the name of appointment for many officers formerly elected directly. Immediate objection to the idea of an appointed judiciary arises from the natural distrust of selection by a governor possessed of only brief authority and not expressly charged with the due administration of justice. The logical principle is that selection of judges should be by that authority which is directly responsible for the administration of justice, which means the head of the state judicial system. The natural corollary is that the person invested with this appointive power should be held responsible by submission at frequent intervals to popular election.

Some form of involuntary retirement, or various forms in various States, will be provided, but given expert selection and an efficiency organization, its nature will be of little importance. It will practically never be invoked. Where the first choice is expert and the environment favorable, death and old age are the limitations upon tenure.

Next to the judge the most significant factor in the administration of justice is the trial lawyer. Popular clamor has not yet successfully dogmatized the relation of the lawyer to justice. The problem is one too complex for popular agitators to compress into a single demand. The lawyer has been scolded and prayed for but constructive proposals for his salvation are lacking.

Nobody knows better than the lawyer the importance of the role he plays in adjudicating controversies. The problem at heart is one of disciplining the Bar. In theory discipline comes from an external authority, the Bench. Perhaps the reason for its practical failure is due to the fact that it is external. For in spite of all theories the courts and the lawyers do not constitute an entity. The lawyer's direct personal interest is in his client's business. This necessarily makes him a representative of selfish rather than of public interests. It is impractical to ask him to

divide his responsibility and bestow part on the court and part on his client, at the same time submitting to cutthroat competition. But moral overstrain should be classed among preventable ailments.

Can there be any discipline which is not self-discipline? Can there be any real government which is not self-government? The Bar has attempted to discipline itself. It has failed because it has possessed no solidarity. To the layman the Bar doubtless looks like a well organized body but nothing could be further from the truth. The strong individuality developed at the Bar and the close attachment to clients' interests have both militated against thorough organization. The Bar is a privileged class but in no sense an entity.

There are three general reasons for organization on the part of the lawyers of a State. The first is for political purposes; to discuss substantive and procedural law. The second is for social ends. Both of these purposes are fully served by voluntary organization such as we have now. But the third and greater reason for organization is the need for self-government and this need cannot be met by voluntary organization. The history of any State bar association proves this conclusively. Self-government of the Bar must be attained through corporate organization and must be all inclusive as to the lawyers of a State.

At present the self-respecting members of the profession admit the existence of an undesirable element but can do very little by way of discipline. Responsibility for disciplining does not rest on the Bar nor has the power been delegated. The public does not realize the essential helplessness of the profession to purge itself.

When all the lawyers of a State are tied together indissolubly and given reasonable scope for co-operating with the courts in suspending and disbarring the unfit the profession will speedily enforce its ethical standards. The will of the majority will dominate. The mighty forces of publicity can be availed of and the conscience of the few become the guide of all.

There is also the need in the larger centers of developing specialization among lawyers as well as among judges. Our law

in all its branches cannot be mastered by any one man. We recognize the need for specialization in the fields of patent law, admiralty law, and criminal law. There is some specialization in jury and non-jury trials and appeals. Specialization in several fields of substantive law is common. We have corporation lawyers, insurance lawyers, commercial lawyers, and other classes. But the one great natural division in the profession is between counselor and advocate. This division obviates the difficulties arising from divided responsibility when the privately retained counselor appears in court.

There is a growing tendency to specialize in these two main lines. Many lawyers never go into court; others do little except try causes. There is economy in such specialization. It makes for efficiency of a high order. It makes the work of the judge more certain and easy. At the same time it subjects the Bench to expert criticism. It should afford a body of lawyers trained to the usages of courts from whom judges would be selected.

Just how far this evolution can advantageously proceed and whether it can properly be accelerated by other than economic and educational forces is very uncertain. But it is fair to presume that there will be in the larger cities some progress in this direction and that a conscious study of needs and means may avail something in making progress sure.

The American Judicature Society proposes to submit its recommendations in the form of model acts. First there shall be an analysis of the causes for dissatisfaction in the administration of justice. The first model act will be one to establish a court for a metropolitan district. There were in 1910 fifty cities in the United States having populations in excess of one hundred thousand. The prospect of material changes in many of these cities makes such a model judicature act appear timely.

A judicature act to create a unified State court system from supreme appellate court to justice of the peace will follow. Each of these judicature acts will be supplemented by schedules of court rules applicable to them and furnishing in substance the procedure which appears to embody the best experience, chosen with reference to successful operation in any State or any foreign

jurisdiction which has inherited the English common law. A model act relating to the organization of the Bar and another to further simplification of reporting are also projected.

In the drafting of model acts it is necessary only to comply with the federal Constitution. In adoption of the substance of such an act the question will obtrude as to how much the act must be emasculated or how much the given constitution must be amended. It will be the usual question of expediency with the great advantage of having at hand an ideal or standard. The fact that the ideal system appears remote makes it possible for men of conflicting views and temperaments to approach from various angles, their steps constantly converging.

The several drafts before publication will be submitted to the Council of the American Judicature Society for expert criticism. The Council is composed of representatives of the Bench, the Bar, and law schools of all the States to the number of about three hundred. It is clear that in this number and with such wide territorial diffusion there will be brought to the study every type of mind and every sort of practical experience.

The American Judicature Society was organized with full appreciation of the immensity of the field in which it hopes to exert a helpful influence. There is most emphatically no wish to usurp the duties of any other body. Its close affiliation with other associations of the Bar is indicated by the names of those who organized it.<sup>3</sup>

*Herbert Harley.*

*Chicago.*

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<sup>3</sup> The organizers and first directors of the American Judicature Society are: Hon. Harry Olson, Chief Justice of the Chicago Municipal Court, chairman; Hon. Woodbridge N. Ferris, Governor of Michigan; John H. Wigmore, Dean of Northwestern University School of Law; Hon. John B. Winslow, Chief Justice of the Wisconsin Supreme Court; Nathan William MacChesney, Frederic Bruce Johnstone and Albert M. Kales, of the Chicago bar; Hon. Frederick W. Lehmann, of St. Louis, former President of the American Bar Association; James Parker Hall, Dean of the University of Chicago School of Law; Roscoe Pound, of Harvard Law School; Herbert Harley, Secretary. The Society maintains an office in the city of Chicago.